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No. 09-891

IN THE

Supreme Court of the United States

NUCOR CORPORATION, *et al.*,
Petitioners,

v.

QUINTON BROWN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Comprising potential defendants to large-scale employment class action litigation, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the type of analysis a district court must undertake in deciding whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure. EEAC is especially concerned with the panel majority's decision below, which reversed the district court's class certification denial on the ground that the district court engaged in too robust a review of the evidence presented in support of class certification, which on its face stated claims suitable for class treatment. The panel majority's decision below effectively rejects the "rigorous analysis" standard established by this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), by requiring only a minimal evidentiary showing by Respondents that their claims meet the threshold requirements of Rule 23. Such a rule, if permitted to

stand, would allow class certification of virtually any well-pled complaint, thus undermining the purposes of the class action tool and profoundly disadvantaging the employers having to defend such actions.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

On August 25, 2004, Respondents commenced an action in the U.S. District Court for the Western District of Arkansas accusing Petitioners of violating Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, and Section 1981 of the Civil Rights Act of 1866 (Section 1981), 42 U.S.C. § 1981, by engaging in a pattern or practice of intentionally discriminatory promotion practices against African-Americans and maintaining a racially hostile work environment. Pet. App. A-9. Respondents also contend that Petitioners' use of subjective criteria for making promotion decisions had an unlawful disparate impact on African-Americans. Pet. App. A-9, A-10.

On May 7, 2007, Respondents moved for class certification, which the district court denied, concluding that they failed to satisfy the commonality and typicality requirements of Rule 23(a)(2) and (a)(3) of the Federal Rules of Civil Procedure. Fed. R. Civ. P.

23(a)(2) & 23(a)(3). The district court found that subjective decision-making alone is insufficient to establish a disparate impact cause of action. In addition, it discredited "alternative benchmark" statistical data offered by Respondents in support of their disparate impact claim. Pet. App. A-12, A-22.

Respondents' data were constructed as a proxy for actual employment data for part of the class period that had been discarded pursuant to standard procedure well prior to suit. Petitioners offered expert testimony that criticized the methodology used by Respondents' experts in generating the proxy data. The district court ultimately concluded that the actual data were more probative than the assumptions-based proxy data, and thus it gave less evidentiary weight to those data than to the results of the actual, available statistical evidence—which the district court concluded were insufficient to establish commonality. Because the district court determined that Respondents failed to satisfy the requirements of Rule 23(a), it declined to analyze Respondents' motion under Rule 23(b). Pet. App. A-12 – A-14.

Respondents appealed the class certification denial to a panel of the Fourth Circuit, which in a 2-1 decision reversed. The panel majority held that the district court improperly discounted direct evidence of race discrimination, which in its view "alone was sufficient to establish commonality" under Rule 23(a)(2). Pet. App. A-12. It also found fault with the district court's conclusion that Respondents' hostile environment claim lacked a sufficient basis for commonality. *Id.*

Finally, the majority determined that the district court's exclusion of Respondents' proxy-based statistical data was erroneous. Pet. App. A-22. Relying on

the Second Circuit's ruling in *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 293 (2d Cir. 1999), *overruled by In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), the panel majority found that the district court did not have the discretion to discredit Respondents' proffered statistical evidence, despite the contrary evidence offered by Petitioners. Pet. App. A-23. As a result, the panel majority ordered immediate certification of the class, even though neither it nor the district court analyzed whether the requirements of Rule 23(b) were met. Pet. App. A-29.

According to the majority, because Respondents' evidence was sufficient on its face to satisfy the threshold requirements of commonality and typicality, the district court should not have engaged in any further, merits-based review of Petitioners' critique of Respondents' statistical study. It characterized the question before the district court as "not whether the appellants have definitively proven disparate treatment and a disparate impact" but rather "whether the basis of appellants' discrimination claims was sufficient to support class certification." Pet. App. A-20. The issue thus framed, the panel majority concluded, citing to this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), that "an in-depth assessment of the merits of appellants' claims at this stage would be improper." Pet. App. A-21. It thus implicitly rejected the "rigorous analysis" standard established by this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), in favor of a standard similar to the "some showing" rule followed initially, but which since has been repudiated, by the Second Circuit in *Caridad*.

Judge Agee partially dissented, arguing that the majority failed to accord the proper level of deference to the district court's class certification determination. He would have affirmed the district court's denial of class certification based on Respondents' failure to satisfy the commonality and typicality requirements of Rule 23. Pet. App. A-32. Judge Agee noted that "[w]hile the majority opinion is correct that a certification determination is not a judgment on the merits of the underlying claims, neither is it a pleadings-based determination that can be verified by any evidence, no matter how deficient." Pet. App. A-35. He continued:

> Certainly since the United States Supreme Court's decision in *General Telephone Co. v. Falcon*, district courts have been *required* to undertake a "rigorous analysis" not just of the plaintiffs' claims as pled, but of the evidence to support those claims in order to make an appropriate judgment on Rule 23 certification . . . . In the case at bar, the district court followed its duty and performed that rigorous analysis, although with a result that the majority may not have reached if they were sitting as the trier of fact. This Court has been clear in explaining that an objection to examining the merits of a class certification claim, as reflected by the majority opinion's citation to *Eisen v. Carlisle & Jacquelin* was rendered invalid after *Falcon*.

Id. (citations omitted). Following denial by the Fourth Circuit of their petition for rehearing *en banc*, Petitioners filed a petition for writ of certiorari with this Court on January 4, 2010.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a growing conflict in the courts regarding the proper standard to be applied in evaluating the propriety of class certification under Rule 23 of the Federal Rules of Civil Procedure. While this Court in *Falcon* instructed that courts are to conduct a "rigorous analysis" in determining whether the requirements of Rule 23 have been satisfied, further clarification is desperately needed regarding the breadth of analysis contemplated under *Falcon*, as well as the standard of proof applicable to plaintiffs seeking Rule 23 class certification.

The panel majority below held that the district court committed reversible error in conducting a merits-based review of whether Respondents satisfied the requirements of Rule 23. Instead of deferring to the district court's reasoned analysis, the panel majority remanded the case for immediate class certification, concluding that Respondents made a "facial" evidentiary showing sufficient to meet Rule 23's requirements of commonality and typicality. It found that the district court did not have discretion to consider opposing evidence offered by Petitioners at the class certification stage.

The panel majority's decision below is inconsistent with the "rigorous analysis" required by *Falcon* in such cases, and also conflicts with rulings of the Second, Third and Seventh Circuits, which all have held that district courts should not refrain from examining the merits of the plaintiffs' allegations at the expense of conducting a thorough Rule 23 analysis. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *In re Initial Pub. Offering*

(IPO) Sec. Litig., 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001). The "facial" showing standard adopted by the court below is generally more consistent with, but still not identical to, the standard applied by some federal district courts that also adhere to the false notion that merits-based inquiries are proscribed at the class certification stage. *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004); *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 635 (N.D. Cal. 2007). Given the obvious conflict in the lower courts regarding what standards apply to motions for class certification under Rule 23, review of the decision below by this Court is warranted.

Review also is needed because without clear guidance from this Court, the lower courts will continue to apply vastly different standards of proof to plaintiffs seeking Rule 23 class certification. The Second, Third, and Fifth Circuits all have held that plaintiffs seeking Rule 23 class certification must establish, by a preponderance of the evidence, "each fact necessary to meet the requirements of Rule 23," *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320; *see also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228-29 (5th Cir. 2009), while the Eleventh and District of Columbia Circuits, now joined by the Fourth Circuit, all apply different, lower standards. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009); *Garcia v. Johanns*, 444 F.3d 625, 634 n.10 (D.C. Cir. 2006).

The lack of consistency in the courts regarding whether, and under what circumstances, Rule 23 class certification is appropriate creates substantial

uncertainty in an area of law that is of great importance to the business community. This inconsistency threatens to undermine the traditional role of the courts as gatekeepers in eliminating meritless cases at the class certification stage, thereby minimizing the enormous pressure placed on defendants to settle such claims.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO PROVIDE MUCH NEEDED CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The decision below, in which the panel majority determined that the district court committed reversible error in conducting a merits-based review of whether Respondents satisfied the requirements of Rule 23, establishes such a low threshold for class certification that it is difficult to imagine an employer that would not be extremely vulnerable under that framework. It departs from decisions of several other courts of appeals and is inconsistent with this Court's admonition that district courts perform a "rigorous analysis" as to whether plaintiffs' evidence supports Rule 23 class certification. Given the conflict in the lower courts on what standards apply to motions for class certification under Rule 23, review of the decision below by this Court is warranted.

To maintain a class action alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, plaintiffs must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23.

Rule 23(a) permits class certification only when "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Rule 23(b)(2), in turn, allows certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) permits certification where "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

In *General Telephone Co. of the Southwest v. Falcon*, this Court declared that district courts, in determining whether plaintiffs seeking class certification have met the requirements of Rule 23, must engage in a "rigorous analysis" of the facts presented in support of the request. 457 U.S. 147, 161 (1982). It noted that in doing so, it sometimes "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160.

Falcon appeared to dispel the misconception that the Court's earlier ruling in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), created a bright-line rule barring merits-based inquiries at the class certification stage. In *Eisen*, the Court observed that

there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits" when considering whether or not the requirements of Rule 23 have been met. *Id.* Shortly after *Eisen* was decided, the Court went on to observe that the "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims . . . [of which] typicality . . . adequacy . . . and the presence of common questions of law or fact are obvious examples." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (citation and internal quotation omitted). It is this overlap between the merits of plaintiffs' claims and the Rule 23 class certification standards that makes it necessary, as the Court eventually instructed in *Falcon*, to "probe behind the pleadings" and inquire into the merits of plaintiffs' allegations. *Falcon*, 457 U.S. at 160.

A. Notwithstanding This Court's Admonition in *Falcon*, There Remains Considerable Disagreement Regarding The Proper Standard To Be Applied By District Courts In Evaluating Rule 23 Motions For Class Certification

Because the Court in *Falcon* did not expressly reconcile the "rigorous analysis" approach with its earlier caution in *Eisen* against merits-based inquiries, however, lower courts have struggled in determining the proper standard to be applied to Rule 23 motions for class certification. The Second, Third and Seventh Circuits, applying *Falcon*, hold that district courts should not—indeed, must not—refrain from examining the merits of the plaintiffs' allegations at the expense of conducting a thorough

Rule 23 analysis. *See In re Initial Pub. Offering (IPO) Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

The Second Circuit recently clarified the proper standard for granting class certification in the context of so-called "statistical dueling" between the parties on the commonality issue, abandoning the approach it previously had adopted in *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999). *In re IPO Sec. Litig.*, 471 F.3d at 39-40. In *In re IPO*, the court noted that *Caridad* condemned "statistical dueling" between experts based on the no-merits-inquiry approach taken by this Court in *Eisen*. *Id.* at 35. It observed that "*Caridad*, by the imprecision of its language, left unclear whether the merits dispute between the experts was not to be resolved at the class certification stage or whether their dispute about a class certification requirement was not to be resolved at that stage." *Id.* The court thus repudiated its prior holding in *Caridad*, concluding that judges must resolve factual disputes relevant to each Rule 23 requirement before ruling on whether to certify a class:

> With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.

Id. at 41.

The Seventh Circuit also has held that where a Rule 23 class certification issue is so closely tied to the merits of the underlying claim, the court "must make a preliminary inquiry into the merits" in order to determine whether class certification is proper. *Szabo*, 249 F.3d at 676. Giving uncontestable weight to the plaintiffs' allegations "moves the court's discretion to the plaintiff's attorneys," and essentially permits the plaintiffs to "tie the judge's hands by making allegations relevant to both the merits and class certification." *Id.* at 677. Relying on the Seventh Circuit's rationale in *Szabo*, the Third Circuit similarly found in *In re Hydrogen Peroxide Antitrust Litigation* that district courts "must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." 552 F.3d at 307.

At the other end of the spectrum lies the decision below, in which the panel majority paid lip service to *Falcon*'s "rigorous analysis" test, but nevertheless ultimately relied on *Eisen* to find that the district court committed reversible error in denying Respondents' motion for Rule 23 class certification. It determined that Respondents made a "facial" evidentiary showing sufficient to meet Rule 23's requirements of commonality and typicality, and that the district court did not have discretion to consider opposing evidence offered by Petitioners at the class certification stage. The panel majority reasoned:

> The question before the district court was not whether the appellants have definitively proven disparate treatment and a disparate impact; rather, the question was whether the basis of appellants' discrimination claim was sufficient to

> support class certification. In excluding the appellants' data, the district court ruled, "These assumptions [regarding the 1999-2000 data] may be reasonable and the statistics based thereupon may be relevant to prove discrimination at the plant. However, the necessity of the assumptions diminishes their probative value." Yet, evidence need not be conclusive to be probative, and even evidence that is of relatively weak probative value may be useful in meeting the commonality requirement.

Pet. App. A-20 (citations omitted). Taking the Respondents' statistical evidence at face value—and disregarding Petitioners' competing evidence—the panel majority concluded that class certification was warranted.

Other federal courts also have refused to conduct a merits-based review in determining whether the requirements of Rule 23 were satisfied, with one such ruling resulting in certification of the largest Title VII employment discrimination class in American history. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). In *Dukes*, a sex discrimination case, the district court granted class certification based on evidence that Wal-Mart maintained a "common policy" of allowing local managers to use some discretion in making employment decisions and that its uniform corporate culture "could be" subject to gender stereotyping. In doing so, the district court refused to consider evidence offered by Wal-Mart undermining class certification, concluding that delving into the merits in such a manner would be improper. It said:

> In *Falcon*, the Court reiterated the well-recognized precept that the class determination

> generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nevertheless, we find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Thus, although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage.

Id. at 144 (citations and internal quotations omitted). A three judge panel of the Ninth Circuit, in a 2-1 decision, affirmed class certification, but that decision since has been vacated by the *en banc* court, which is reviewing the panel majority's determinations. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), *vacated and reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009).

In *Ellis v. Costco Wholesale Corp.*, the district court ignored *Falcon* in its discussion of the legal standard for granting class certification, choosing instead to rely on the Ninth Circuit's pre-*Falcon* precedent to conclude that it must accept the allegations in the plaintiffs' complaint as true as long as it sets forth the basis of the plaintiffs' claims with specificity and clarity. 240 F.R.D. 627, 635 (N.D. Cal. 2007). The district court's adherence to this standard, as well as its rigid interpretation of *Eisen*, was evident throughout, as it continually resolved the parties' conflicting evidence in favor of the plaintiffs ostensibly to avoid engaging in what it believed would be a prohibited, merits-based inquiry.

Because the decision below reflects a persistent conflict in the lower courts regarding the proper standard to be applied in evaluating Rule 23 motions for class certification, review by this Court is warranted.

B. Without Clear Guidance From This Court, The Lower Courts Will Continue To Apply Vastly Different Standards Of Proof Applicable To Plaintiffs Seeking Rule 23 Class Certification

"Although it is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met, little guidance is available on the subject of the proper standard of 'proof' for class certification. The Supreme Court has described the inquiry as a 'rigorous analysis' and a 'close look,' but it has elaborated no further." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 315-16 (citations and footnote omitted). Indeed, left to figure it out, the lower courts have applied wide ranging standards of proof on plaintiffs seeking to proceed on a classwide basis. *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196 (2d Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

The Second, Third, and Fifth Circuits all have held that plaintiffs seeking Rule 23 class certification must establish, by a preponderance of the evidence, "each fact necessary to meet the requirements of Rule 23." *In re Hydrogen Peroxide Antitrust Litig.*, 552

F.3d at 320; *see also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d at 202; *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d at 228-29. As the Second Circuit explained:

> Although we did not use the words "preponderance of the evidence" in *In re IPO* to describe the standard of proof applicable to Rule 23 issues, we in effect required the application of a cognate standard by directing district courts "to assess all of the relevant evidence admitted at the class certification stage," to "resolve[] factual disputes relevant to each Rule 23 requirement," and "[to] find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established," notwithstanding an issue's overlap with the merits. Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

Teamsters, 546 F.3d at 202 (citations omitted).

By contrast, the Eleventh Circuit has suggested that plaintiffs, in order to proceed as a class, must make "some showing" that all of the requisite Rule 23 requirements have been satisfied, *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009), while the District of Columbia Circuit seems to endorse a "significant showing" proof standard. *Garcia v. Johanns*, 444 F.3d 625, 634 n.10 (D.C. Cir. 2006). The decision below further deepens the conflict by, in effect, imposing only a minimal, "facial" burden on plaintiffs to demonstrate that all of the Rule 23 class certification requirements have been satisfied. As the dissent pointed out:

> The majority's opinion could reasonably be interpreted to require class certification so long as future plaintiffs seeking class certification can produce any data set exceeding two standard deviations without regard to the unreliability of that data or the process by which it was derived. Equally troubling is the prospect that certification is required no matter how attenuated and insufficient a plaintiff's direct evidence is shown to be.

Pet. App. A-59.

The panel majority's approach below seems to comport most closely with the "threshold showing" approach expressly rejected by both the Second and Third Circuits, use of which "risks misapplying Rule 23." *In re Hydrogen Peroxide*, 552 F.3d at 321. As the Third Circuit explained:

> A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification received deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard.

Id. Without further clarification from this Court, the lower courts will continue to apply remarkably differing standards of proof to plaintiffs seeking class certification under Rule 23, as employers subject to class litigation in multiple jurisdictions continue to face substantial uncertainty in defending such claims.

II. IMPROPER CERTIFICATION OF EMPLOYMENT DISCRIMINATION CLASS ACTIONS PROFOUNDLY DISADVANTAGES EMPLOYERS, WHO OFTEN ACQUIESCE TO THE PRESSURE TO SETTLE SUCH CLAIMS, REGARDLESS OF THEIR MERIT

A district court's decision on a Rule 23 motion for class certification "is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *In re Hydrogen Peroxide*, 552 F.3d at 310 (citation omitted). Indeed, class certification "'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Id.* (quoting Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments). Because of the importance of Rule 23 class certification determinations, courts must be able to understand and rigorously apply the rules in a manner that ensures consistency and fairness for both plaintiffs and defendants.

The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called judicial "blackmail." *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). As the Eleventh Circuit has found:

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the

> plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added).

Judge Posner also astutely has observed that when companies face millions, or in some cases, billions, of dollars in potential liability as a result of a class action, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citation omitted). *See also In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting) (quoting *Rhone-Poulenc Rorer*), *overruled on other grounds by In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167-68 n.8 (3d Cir. 2001) (same).

Traditionally, it has been the role of the courts to act as gatekeepers in eliminating meritless cases at the certification stage, minimizing the enormous "blackmail value" of large classes. *Rutstein*, 211 F.3d at 1241 n.21. The panel majority's improper application of Rule 23's class certification requirements represents an abandonment of that role. By allowing unchallenged evidence to form the basis for class certification on the theory that the evidence will be evaluated at trial, the panel majority ignores the reality that class certification almost invariably leads to a settlement, making it likely that the evidence will never be evaluated. The decision below will make it easier to certify large class actions, increasing exponentially the pressure on employers to settle even meritless claims.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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